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No. _____

In The
Supreme Court of the United States

OCTOBER TERM: 1983

G. Harold KING, Jr., Appellant
Petitioner

v.

FIDELITY NATIONAL BANK OF BATON ROUGE,
Appellee
Defendant

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Petition of
G. HAROLD KING, JR.
Petitioner-Appellant,
for a Writ of Certiorari

Respectfully submitted
BY ATTORNEY
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THE QUESTIONS PRESENTED FOR REVIEW

(1) Under the Constitution and laws of the United States, as particularized in *Marathon*, ante, and the Emergency Resolution developed by the Judicial Conference of the United States, can a NON-Article III entity DENY rights of Jury Trial, or any trial, to an individual against whom an involuntary petition in bankruptcy has been filed, under Sec. 303 of the Bankruptcy Code (11 U.S.C. 303)?

(2) When a United States Court of Appeals decrees that an involuntary petition under 11 U.S.C. 303 should NOT have been filed against a spouse simply because she was married to an alleged bankrupt, and orders her DISMISSED from said proceeding, is it proper for the Court, at the same time, to condone her being subject to a RULE 205 RBP examination without an Order of Court authorizing same, as required by said Rule?

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Beacon Theatres Inc. v. Westover (1959) 359 U.S. 500, 79 S.Ct. 948, 3 L. Ed2d 988

Harrison v. Chamberlin (1926) 271 U.S. 191, 194-195, 46 S.Ct. 467, 70 L. Ed. 897

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Harvey v. Great Atlantic and Pacific Tea Co. (CA 5th 1968) 388 F.2d 123

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Article III Sec 1 of the United States Constitution
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COLLIER ON BANKRUPTCY, 14th Ed. V 12 pages 2-75/2-98
Moore's Federal Practice V. 5A Par. 45.05(2) page 45-37 Par. 45.03 page 45-16

Commentaries on the Laws of England by SIR WILLIAM BLACKSTONE Fourth Edition by *James DeWitt Andrew* Calaghan and Company (1899)

A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF TH'S COURT IS INVOKED

I

In addition to the grounds specified in the last part of Rule 17.1.(a), jurisdiction is invoked for the primary reason of affording opportunity for this Court to speak on the right of JURY TRIAL under 11 U.S.C. 303 and other provisions of the Bankruptcy Code—a topic on which there is a paucity of clarification, and much confusion.

Here is a man, G. Harold King, Jr., who served his country with distinction and honor in the United States Navy during World War II, and who was formerly Chairman of the Board of the Federal Reserve Bank in New Orleans, Louisiana, and later an Eisenhower Appointee to the Federal Reserve Board in Washington, D.C. (fifth item in Appendix). Yet this same individual is denied rights even common criminals receive! He is not only denied JURY TRIAL, but any trial, where material issues of fact are unresolved.

II

The particular reason for invoking jurisdiction is, if this Court desires additional justification of its decision in Marathon, supra, it can be found in the brutal facts of this case. Let the Supreme Court not search for a more appropriate illustration—it can not be found!

To some, the term "ART. III Court'" may be only a term of abstraction. But to Shirley G. King, it means salvation from the horror and torment inflicted on her and her minor children by a NON-Article III court, for, indeed it was an ART. III Court, the United States Court of Appeals for the Fifth Circuit, that released her!

III

Another important reason is to afford an additional opportunity for this Court to declare guidelines for the

United States Congress that seems to be having considerable difficulty in enacting remedies under the Bankruptcy Code mandated by Marathon, supra.

To the extent that any declarations by this Court may assist Congress in preventing future brutal injustices, such as occurred in entrusting such drastic power to NON-Article III Tribunals, this petition will have served a most worthy purpose.

IV

A fourth reason is to afford the Supreme Court opportunity to change an absurd interpretation given to its Rule 205(a) of the Rules of Bankruptcy Procedure, by the United States Court of Appeals for the Fifth Circuit.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED AND THE BASIS FOR FEDERAL JURISDICTION

This case involves Article III Sec. I of the Constitution of the United States, as well as the Amendment VII thereto.

The primary statute involved is 11 U.S.C. 303.

Other statutes involved are 11 U.S.C. 501 and 11 U.S.C. 727(c)(1).

To the extent that Marathon, supra, has invalidated Sec. 241.(a) of Public Law 95-598, it would appear that 28 U.S.C. 1480(b) has been declared unconstitutional, and this is the basis on which Petitioner proceeds. Quaere as to whether 28 U.S.C. 1471 is applicable to jurisdiction. (See: Emergency Resolution Rule developed by the Judicial Conference of the United States premised on the assumption that Marathon, supra, has not invalidated 28 U.S.C. 1471(a) and (b).

Reliance is had on 28 U.S.C. 2101(c) and Rule 20 sub-sections .2. and .4. of this Court as the basis for Federal Jurisdiction.

A CONCISE STATEMENT OF THE CASE

On July 24, 1981, the Fidelity National Bank of Baton Rouge filed a joint involuntary chapter 7 petition against G. Harold King, Jr. and Shirley G. King, under 11 U.S.C. 303. (first item in Appendix)

After the Kings filed a motion for a more definite statement, and motions to dismiss for failure to state a claim on which relief could be granted and lack of personal jurisdiction, the bank sought to examine the Kings under Rule 205 RBP and procured subpoenas without an order of court authorizing same.

On September 11, 1981 the Kings filed their ANSWER to the involuntary petition (second item in Appendix) with their request and prayer for Trial by Jury.

In the interim, the bank had subpoenas served on the Kings to compel their appearance for the examination. The day before the scheduled examination, the Kings filed a motion "to set aside" the notice and subpoena. On the advice of counsel, they did not attend the examination.

At all times pertinent, the court had ruled neither on the inital motions nor the motion to vacate, filed by the Kings. The bank moved for sanctions, and, after a hearing, the court fined the King's attorney $250.00!

On a motion for summary judgment filed by the bank, the court ignored the verified ANSWER of the Kings, disallowed trial by jury, disallowed ANY trial of the issues raised by the Kings in their ANSWER, and awarded summary judgment of an order for relief.

The Kings appealed to the District Court, then to the United States Court of Appeals for the Fifth Circuit. That Court (third item in Appendix) affirmed the judgment of the District Court other than its affirmance of the bankruptcy court's entry of the order for relief against Shirley King, in saying:

> "...we vacate the affirmance of that order and remand with instructions to direct the bankruptcy court to

vacate the order for relief against Shirley King and dismiss the petition against her."

Applications for rehearing by the Fidelity National Bank et al were denied October 11, 1983. (fourth item in Appendix) This Petition for Certiorari followed!

A DIRECT AND CONCISE ARGUMENT

11 U.S.C. 303(b)(1) provides:

"(b) An involuntary case is commenced by the filing...of a petition under chapter 7...

(1) by three or more entities, each of which is...a holder of a claim AGAINST SUCH PERSON that is not contingent as to liability...if such claims aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;" (Caps ours).

Unless the test of 303(b)(1) is met, there is no basis for invoking involuntary jurisdicition.

The Fifth Circuit (712 F.2d 188, 192) said that there was "absolutely no evidence of bad faith" on the part of the intervenors constituting two of the entities. But WHERE were we afforded opportunity to show otherwise in the employment of summary judgment (FRCP 56(c)/RBP 756(c)) that there were NO genuine issues as to any material facts?

Additionally, where the Court says (on the same page); "The lower courts clearly thought that summary judgment was warranted or they would not have granted it."———

is this not true of every case wherein summary judgment is granted? Hereafter, can Jury Trial be aborted in every case wherein lower courts hold such belief?

Does this not also conflict with the finding (page 190) "Shirley King was joined in the petition merely because she was Harold King's wife and HIS obligations were presumptively those of the marital community." (Caps

and und'scr ours)?

Obviously, such finding shows that the bank did not have a claim "against such person" of Shirley G. King within the requirement of 303(b)(1)!

Neither did the bank have claims against the person of G. Harold King, Jr., according to the verified allegations of his ANSWER to the involuntary petition! These disclose:

1 - A tie-in between the bank, King Lumber Industries, Inc., and I.H. Rubenstein, Inc.—more fully amplified in the Answer, which damaged the interests of Petitioner.

2 - That one of the properties covered under the bank's mortgage constituted the home occupied by King's father—a fact well within the knowledge of the bank.

3 - That because of this, G. Harold King, Jr. was at all times pertinent at the mercy of the bank, in that NOT to abide by its wishes might have endangered foreclosure, with the knowledge that such could possibly kill the father.

4 - That the bank knew that the sole and only reason whereby G. Harold King, Jr. affixed his signature to the notes of King Lumber Industries, Inc., was on account of concern for his father.

5 - That the father died in August of 1981!

6 - That prior to the execution of the bank's mortgage (March 6, 1980), Petitioner had NEVER endorsed obligations of King Lumber Industries, Inc. to the Fidelity National Bank.

7 - That said mortgage became a weapon of intimidation and harassment.

8 - That there were serious questions whether his signatures on corporate notes constituted his personal endorsement in law, and that in particular reference thereto, 1) at no time was he requested to obligate the legal community, 2) nor did he have the intention of doing so.

In specific reference to the involuntary petition, he DENIED that he was indebted unto the Fidelity National Bank in the amount alleged, DENIED that the Fidelity

National Bank held unsecured claims for the sum of $64,000.00, and DENIED that any claims of the Fidelity exceeded the value of any lien by $5,000.00.

In addition to praying for Trial by Jury before a United States District Court and United States District Judge, he specifically prayed for a jury determination on whether the Fidelity National Bank

a) properly evaluated its security, so as to allege itself an unsecured creditor—

b) was in fact the holder of unsecured claims in the amount of $64,000.00—

c) was in fact the holder of any unsecured claim of at least $5,000.00 more than the value of any lien—

d) filed its petition in good or bad faith—and—

IN ADDITION, HE PRAYED FOR A SPECIAL FINDING WHETHER HE WAS UNDULY PRESSURED BY THE BANK IN THE PLACEMENT OF HIS SIGNATURES ON DOCUMENTS.

In this entire record, there is not a single finding on any of these issues, all of which go to the jurisdictional issue of whether the Fidelity National Bank had grounds to invoke 11 U.S.C. 303!

In *Marathon*, supra, this Court held that the broad grant of jurisdiction to the bankruptcy courts under the Bankruptcy Reform Act of 1978 was unconstitutional because the bankruptcy courts are not Article III courts.

The Judicial Conference of the United States developed, as an emergency interim measure, a rule for adoption by the district courts—all of which districts have adopted the identical or similar measure.

Insofar as pertinent here, under the emergency rule the bankruptcy judges may perform all acts and duties necessary "except that the bankruptcy judges may not conduct" JURY TRIALS! Those matters which may not be performed by the bankruptcy judge shall be transferred to a

district judge!

The cherished right of Jury Trial has been reinforced by many decisions under the laws and Constitution of the United States.

In Monolith (CA 9th 1957) 240 F.2d 444, 445, the Court said:

> "Attorneys often give high rhetorical praise to the function of a jury under the common law system—and then, when it suits their clients' purposes, in order to defeat an adversary's demand for a jury trial they invoke "Governmental immunity", "lack of statutory right", " Inappropriateness" etc.
>
> "In the instant case, we do not propose to lend ourselves to any such ambivaluation of that potent instrument of Anglo-American law." (und'scr ours)

The cases best illustrating the absolute right to Jury Trial are: DAIRY QUEEN v. WOOD (1962) 369 U.S. 469, 82 S.Ct. 894, 8 L. Ed2d 44, and BEACON THEATRES INC. v. WESTOVER (1959) 359 U.S. 500, 79 S.Ct. 948, 3 L. Ed2d 988. In referring to these decisions, Tights, Inc. v. Stanley (CA 4th 1971) 441 F.2d 336, 337, says:

> "The Supreme Court has maintained a careful vigilance to assure this right (of jury trial) against erosion..." (() ours)

However, the strongest language supporting this right through implication, can be found in Marathon, supra:

> "Appellants cite...language to support their proposition that a bankruptcy court...power is constitutional, because the law of bankruptcy is a "specialized area," and Congress has found a "particularized need" that warrants "distinctive treatment."...
>
> "The flaw in appellants' analysis is that is provides no limiting principle.
>
> * * * * *
>
> "On appellants' reasoning Congress could provide for

the adjudication of these and "related" matters by judges and courts within Congress' exclusive control." The potential for encroachment upon powers reserved to the Judicial Branch...is dramatically evidenced in the jurisdiction granted to the courts created by the Act before us.

* * * * *

In short, to accept appellants' reasoning would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantees of an independent Judicial Branch of the Federal Government." (und'scr ours)

In this connection, the words of the Hon. MILES W. LORD, the United States District Judge that wrote the Marathon decision in the district court (12 Bank.Reptr. 946), have special meaning.

"The affairs of insolvent men are no less diverse than the affairs of men of more substantial means. INDEED NO CLASS OF INDIVIDUALS NEEDS THE PROTECTION OF AN INDEPENDENT JUDICIARY MORE THAN THE BANKRUPT." (Caps ours for emphasis)

We respectfully submit that the rights of G. Harold King, Jr. were effectively eviscerated by denial of Jury Trial (or any trial) under the guise of summary judgment. Indeed, one may ask, if a bankruptcy judge cannot conduct a JURY TRIAL under the emergency rule, by what right does he DENY such right?

Certainly NOT from the overwhelming jurisprudence dealing with summary judgement!

In HARRISON v. CHAMBERLIN (1926) 271 U.S. 191, 194-195, 46 S.Ct. 467, 70 L. Ed. 897, the Supreme Court said:

"...we are of opinion that when the claimant's

contention 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy,'...in matters either of fact or law, (it) is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color or merit, and a mere pretense." (Und'scr and () ours)

This, we submit, is landmark language reiterated, in substance, in a line of cases, including Powell v. City of Key West Florida (CA 5th 1970) 434 F.2d 1075, Harvey v. Great Atlantic and Pacific Tea Co. (CA 5th 1968) 388 F.2d 123, SARTOR v. ARKANSAS NATURAL GAS CORP. (1944) 321 U.S. 620, 64 S.Ct. 724, 88 L. Ed. 967, and Cameron v. Vancouver Plywood Corp. (CA 9th 1959) 266 F.2d 535, 540, wherein the Court said:

"All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment...It is especially necessary to be cautious in making such a determination where, as here, a jury trial has been demanded."

The history of RULE 205 RBP is covered in COLLIER ON BANKRUPTCY, 14th Ed. V. 12 pages 2-75/2-98. It was based primarily upon Sections 7a(10) and 21 a of the Bankruptcy Act. Sec. 7a(10) envisioned examination before the referee or judge of the bankruptcy court. Sec. 21a envisioned examination at a place other than the bankruptcy court, but before a judge of a state court.

Unfortunately, when RULE 205 was promulgated, it omitted the requirements stated. Indeed, by its literal language, there is no requirement that said examination be conducted before anyone authorized to administer oaths! THERE IS NO REQUIREMENT THAT THE

EXAMINATION BE REDUCED TO WRITING AND FILED IN THE RECORD! And, under its liberal terms, an entity can be ordered to Tiger Stadium for examination!

One thing is certain, however, and that is Rule 205 requires an ORDER OF COURT for its issuance. This is clear from sub (a) of said Rule which provides:

> "...the court may order the examination of any person." (und'scr ours)

The language of RULE 205 is similar to that found in RULE 35 FRCP, sub (a)

> "...the court...may order the party to submit to a physical or mental examination..."

and to the language found in 5 U.S.C.A. 552 (the Freedom of Information Act) in sub-sections (a)(4)(B) and (a)(4)(F):

> "...the district court...has jurisdiction...to order the production of any agency records..."
>
> "Whenever the court orders the production of any agency records..."

U.S.V. Portland Cement Co., supra, and Pioche, cited by the Fifth Circuit on page 191 of its decision, are not controlling here since both dealt with deposition procedure only and NEITHER was dependent upon an "Order of Court" for validity.

We followed exactly the procedure specified in RULE 45(d)(1) FRCP and the directive from Moore's Federal Practice V. 5A Par. 45.05(2) at page 45-37:

> "Where the service is improper...the person to whom the subpoena is directed may ignore it and present the defense of want of jurisdiction of his person at a subsequent proceeding." (und'scr ours)

To have done otherwise would have dignified a most flagrant usurping of authority vested only in the bankruptcy court! For this serious infraction, the bank escapes without an iota of condemnation, while the Attorney who tried to protect the integrity of the same court, is penalized!

Out purpose is raising this issue is not to stress technicalities, but rather to demonstrate brutal injustice! The Fifth Circuit referred to Shirley G. King's inclusion (Page 190) as a situation "that is not dealt with in the rules simply because IT OUGHT NEVER TO ARISE (Caps ours)"

Yet this same woman was ordered to appear at the office of the bank's attorney and undergo unrestricted examination WITHOUT AN ORDER OF COURT! This was done by the bank ignoring any "order of court" and obtaining a subpoena under RULE 45(a) FRCP which employs the mandatory language "shall be issued" and issued "in blank." In the view of Moore's Federal Practice V. 5A Par. 45.03 at page 45-16:

> "The clerk MUST issue any subpoena in blank, UPON REQUEST OF A PARTY..." (Caps ours)

Our prime reasons for the writ invlove the denial of Jury Trial! Speaking of Trial by Jury, SIR WILLIAM BLACKSTONE commented:

> "...the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law...it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affectd either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. A constitution, that I may venture to affirm has, under providence, secured the just liberties of this nation for a long succession of ages." Fourth Edition Vol. II Ch. 23 Page 1139

Again referring to the fifth item in the Appendix, if such "transcendent privilege" of Jury Trial (or any trial) can be destroyed in relation to Petitioner, who has immunity from such destruction? If such desecration is condoned in the field of bankruptcy, what field of law is exempt?

This is not the only destruction involved here.

When the Fifth Circuit says (Page 192) that:

> "...had the intervenors chosen not to participate in the bankruptcy proceedings, King would have been able to plead a discharge received in these proceedings...",

might we inquire what happened to 11 U.S.C. 501 allowing a creditor to file proof of claim without being an intervenor, and to 11 U.S.C. 727(c)(1) wherein the trustee or a creditor may object to discharge without intervenor status?

When the Fifth Circuit says (Page 189 Note 3):

> "The Kings included a variety of other questions in their notices of appeal to this court, but these questions were not addressed in their briefs and are thus waived.",

it is to be regretted that the Fifth Circuit did NOT point out that SIX (6) APPEALS were consolidated into ONE (1) APPEAL, and under the size limitations on briefs under the Rules of the Fifth Circuit, we were forced to abandon issues.

If cherished rights are to be destroyed, the United States Supreme Court, as the final safeguard on liberties, should be afforded right of final decision on such matters.

CONCLUSION AND PRAYER

We respectfully submit for the reasons advanced herein that This Court should issue a Writ of Certiorari and summarily VACATE the Order for Relief (or adjudication in bankruptcy) entered against G. HAROLD KING, JR., and direct the United States Court of Appeals for the Fifth Circuit to order (1) Either a Trial by Jury before the United States District Court for the Middle District of Louisiana, of the issues and defenses raised by the said G. HAROLD KING, JR. in his Answer to the Involuntary Petition, or (2) A Dismissal of the Involuntary Petition.

We pray that this summary relief be afforded under the rules announced by This Court in:

PAN-AMERICAN LIFE INSURANCE CO. v.

MENENDEZ RODRIGUES et al (1964) 376 U.S. 779, 84 S.Ct. 1130

AETNA INSURANCE CO. v. MENENDEZ (1964) 376 U.S. 781, 84 S.Ct. 1131

STANDARD CIGAR CO. v. TABACALERA SERERIANO JORGE, S.A. (1964) 376 U.S. 780, 84 S.Ct. 1131

FIRST HOUSTON INVESTMENT CORP. et al v. WILSON (1979) 444 U.S. 959, 100 S.Ct. 442, 621 L. Ed2d 371

BUSH v. LUCAS (1980) 446 U.S. 914, 100 S.Ct. 1846, 64 L. Ed2d 268

MILLER v. CASTLEWOOD INTERNATIONAL CORP. (1980) 446 U.S. 949, 100 S.Ct. 2914, 64 L. ed2d 806

We further pray for all other relief necessary.
Respectfully submitted

BY ATTORNEY

/s/ Franz Joseph Baddock

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CERTIFICATE OF SERVICE

I certify under Rule 28.5, that I have this date, by prepaid mail, forwarded three (3) copies of the foregoing Petition for Certiorari to MR. DAVID S. RUBIN, Attorney, P.O. Box 2997, Baton Rouge, Louisiana 70821, who is counsel for the FIDELITY NATIONAL BANK OF BATON ROUGE.

I further certify (in accordance with 712 F.2d 188, 189 Note 2), that since neither Capital Investments, Inc. nor Louisiana Equity Capital Corp. filed any brief or otherwise appeared in the appeal before the United States Court of Appeals for the Fifth Circuit, that no service was necessary on these entities under Rule 28.5, and that all parties required to be served have been served under the said Rule 28.5.

Nevertheless, to apprise all entities that may have interest in this matter, I further certify that I have served an information copy of the same petition on Mr. FREDERICK R. TULLEY, Attorney, P.O. Box 2471, Baton Rouge, Louisiana 70821, Mr. CHARLES N. MALONE, Attorney, P.O. Box 3233, Baton Rouge, Louisiana 70821, and Mr. MICHAEL T. PERRY, Attorney, 5420 Corporate Blvd., Suite 302, Baton Rouge, Louisiana 70808.

BATON ROUGE, Louisiana, this January 5th, 1984.

/s/ FRANZ JOSEPH BADDOCK